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Idaho's Reply Brief to the USA and CDAT

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA	) Consolidated Subcase No. 91-7755
	)
Case No. 49576	) STATE OF IDAHO'S
	) MEMORANDUM IN REPLY TO
	) RESPONSES OF UNITED STATES
	) AND COEUR D'ALENE TRIBE
	)

DESCRIPTIVE SUMMARY

The following Memorandum is submitted in reply to the United States' Response to the State of Idaho's and Objectors' Motions for Summary Judgment, and the Coeur d'Alene Tribe's Response to the State of Idaho, Hecla, and the North Idaho Water Rights Group. It is accompanied by the Fourth Affidavit of Steven W. Strack with attached exhibits.

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I. ARGUMENT

A. THE COURT IN *IDAHO II* NEVER ADDRESSED THE ISSUE OF WHETHER THE 1891 ACT SUPERSEDED THE 1873 EXECUTIVE ORDER.

The United States and the Tribe assert that in *Idaho v. United States*, 533 U.S. 262 (2001) (*Idaho II*), the Supreme Court rejected the argument made by the State herein, i.e., that the Act of March 3, 1891, superseded the 1873 Executive Order and established the purposes that the Coeur d'Alene Reservation was to serve thereafter. The Tribe goes further and asserts that "[d]espite the State's characterization to the contrary, a central issue in *Idaho II* was whether Congress ratified or rejected the 1873 Executive Order when it passed the 1887 and 1889 Agreements into law." Tribe Resp. Br. at 6.

The Court, however, never concluded that Congress "ratified" the 1873 Executive Order. In fact, the Court, after reiterating the history of the Reservation up through the negotiation and signing of the 1887 Agreement (which would have set aside a reservation using the same boundaries as the 1873 Executive Order), found as follows:

> Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself. The House Committee on Indian Affairs later recalled that the 1887 agreement was not promptly ratified for
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> > "sundry reasons, among which was a desire on the part of the United States to acquire an additional area . . . . It contains a magnificent sheet of water, the Coeur d'Alene Lake...." H.R. Rep. No. 1109, 51st Cong., 1st Sess., 4 (1890).
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> But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians," and, specifically, to negotiate "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Act of Mar. 2, 1889. Later that year, the Tribe and Government negotiators reached

> a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene . . . . And again, the agreement was not to be binding on either party until both it and the 1887 agreement were ratified by Congress.
>
> . . . .
>
> On March 3, 1891, Congress "accepted, ratified, and confirmed" both the 1887 and 1889 Agreements with the Tribe.

533 U.S. at 269-71 (emphasis added). Thus, the Court found conclusively that Congress "was not prepared to ratify the 1887 agreement" unless the boundaries were substantially altered to exclude the Lake and lands not suitable for agriculture. Then, in 1891 Congress ratified the 1887 and 1889 Agreements, not the 1873 Reservation.

The United States and the Tribe, however, attempt to confuse the issue by arguing that Idaho is estopped from asserting that the 1891 Act superseded the earlier executive order because the *Idaho II* Court did expressly adopt Idaho's argument that the 1888 statute ordering a reduction in the 1873 Reservation impliedly "repudiated" the Reservation. U.S. Br. 5. The arguments of the United States and the Tribe assert a distinction without a difference. The common meaning of "repudiate is "refuse to accept."[1] The Supreme Court, by holding that Congress was "was not prepared to ratify" the reservation as described in the 1873 Executive Order, verified that Congress chose not to accept the Reservation established by the 1873 Executive Order until an agreement was reached to exclude lands and waters that were not useful for agriculture.

Moreover, the United States and the Tribe are simply wrong when they assert that *Idaho II* determined that Congress ratified the purposes of the 1873 Executive Order. The Ninth Circuit held that it was not "necessary to determine the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873)," because the issue before the court "did not require either that Congress itself

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[1] Merriam-Webster.com/dictionary/repudiate (last visited March 16, 2017).

apprehend the purpose [of the Executive Order] or that the purpose be extant at the time of congressional action." 210 F.2d at 1075-76.

In other words, the court concluded that "[f]ormal ratification, prior to statehood, of the 1887 and 1889 agreements is not necessary for a finding of congressional intent to defeat state title," rather, "[w]hat mattered was that Congress recognized that the executive reservation included submerged lands, not that it knew or acknowledged the executive purpose in reserving them." 210 F.3d at 1076 (emphasis added). Likewise, the Supreme Court framed its inquiry as follows: "the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes the reservation [before statehood] in a way that demonstrates an intent to defeat state title." 533 U.S. at 273 (emphasis added). Hence, the Supreme Court never concluded that Congress "ratified" the 1873 Reservation, rather, the only items it identified as being ratified by Congress were "the 1887 and 1889 agreements," 533 U.S. at 279, as confirmed by the fact that the Court referred to the Reservation approved in the 1891 Act as "the ratified reservation." 533 U.S. at 270-71.[2]

The *Idaho II* findings that Congress, by ordering negotiations with the Tribe for a substantial reduction in the 1873 Reservation, thereby "recognized" the Tribe's ownership of lands therein, is not inconsistent with the State's assertion that Congress later superseded the 1873 Executive Order when "[o]n March 3, 1891, Congress 'accepted, ratified, and confirmed' both the 1887 and 1889 agreements with the Tribe." 533 U.S. at 270-71. Nor do Congress' pre-statehood recognitions of the Reservation foreclose the conclusion that the

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[2] The district court concluded that Congress' pre-statehood actions "ratified the Executive reservation of the submerged lands," 95 F. Supp. 2d at 1114, but the district court's conclusion was not adopted by the Ninth Circuit or the Supreme Court, which, in accordance with their precedents, found only that Congress' pre-statehood action amounted to a "recognition" of the Executive reservation, and used the term "ratify" only in relation to the 1891 Act's approval of the 1887 and 1889 Agreements.

1887 and 1889 Agreements ratified by Congress had a purpose different than the 1873 Executive Order. Indeed, because ownership of submerged lands turned solely on "Congress's awareness that the 1873 reservation included submerged lands," the Ninth Circuit concluded that for purposes of determining such ownership "it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889." *Id.* at 1076.

In short, the holdings in in *Idaho II* are consistent with the State's assertions that (1) the 1891 Act supersedes, rather than ratifies, the purposes of the 1873 Executive Order, (2) the purpose of the 1873 Executive Order was not "extant at the time of congressional action," 210 F.3d at 1076, and (3) that "Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889." *Id.*

Nor does *Idaho II* prevent the State from asserting, or this Court from concluding, that at the time of the 1891 Act traditional subsistence was a secondary use of the Reservation. The United States errs when it implies that *Idaho II* rejected the assertion that "fishing was not particularly important to the Tribe" by 1891. U.S. Br. 19. The U.S. likewise errs when it avers that the "Court denied the assertion that the 1889 events resulted in a Tribal and Federal abandonment of subsistence uses of waterways." U.S. Br. 21. Glaringly, the United States does not provide any quotes or citations from *Idaho II* to support its assertions. In fact, as demonstrated in the attached Addendum, the *Idaho II* courts made no findings regarding the importance of subsistence fishing at the time of the 1887 and 1889 agreements or the 1891 Act; rather, all finding discussing subsistence related to the 1873 era. *See, e.g.*, 210 F.3d at 1075 ("As the district court found, and as the State does not challenge, the Tribe was dependent on its fisheries in 1873"). And, as the record demonstrates, it is beyond contest that by 1889 the Tribe, with few exceptions, resided on the agricultural lands

of the Hangman Valley, and the Tribe's economy was primarily based on agriculture. *See* State's Statement of Additional Facts ¶¶ 1-12; 25, 33-36; 44-46.

Because the *Idaho II* courts never reached any conclusions regarding the purpose of the 1891 Act or whether it supersedes the 1873 Executive Order, nor any findings relating to the Tribe's primary reliance on agriculture in the 1891 era, collateral estoppel does not apply, regardless of whether such issues were raised in briefing. Collateral estoppel, or issue preclusion, applies only to legal or factual issues "actually decided in the prior litigation." *D.A.R. Inc. v. Sheffer*, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000). In *Idaho II*, the courts never made any factual determinations relating to the Tribe's reliance on agriculture in the 1891 era, its reliance on traditional subsistence in the 1891 era, or the purposes of the reservation established in the 1891 Act. Nothing in *Idaho II* prevents this Court from independently examining the purposes of the United States and the Tribe as embodied in the agreements ratified in the 1891 Act.

1. Congress' Recognition of the 1873 Executive Order Reservation Did Not Prevent Congress from Later Superseding the Executive Order When it Ratified the 1887 and 1889 Agreements.

The Tribe argues that regardless of the holdings in *Idaho II*, the historical records, as interpreted by its expert, E. Richard Hart, demonstrate conclusively that Congress "confirmed and ratified the 1873 Executive Order and made its 1873 date efficacious." Tribe Br. 18 (quoting Hart rebuttal report). The congressional actions cited by Mr. Hart consist of a series of annual reports and appropriations providing support for the Coeur d'Alene Reservation. 2d Aff. R. Hart, Ex. 1 at 56.

The Tribe's reliance on its expert for the opinion that Congress "ratified the 1873 Executive Order" is misplaced, for the determination of congressional intent is a question of law, not fact. *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015) ("[t]he interpretation of a

treaty is a question of law and not a matter of fact") (quoting *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986)). And, the Tribe is bound by the Supreme Court's determination that "Congress was not prepared to ratify the 1887 agreement," which would have confirmed the Reservation set aside in 1873 to meet the Tribe's subsistence needs. It is likewise bound by the conclusion in *Idaho II* distinguishing congressional "recognition" of the reservation from formal ratification of the Reservation's purposes. 210 F.3d at 1076.

Mr. Hart's assertions notwithstanding, congressional actions recognizing the 1873 Reservation do not, without more, imply ratification of the Executive Order's purposes, or even suggest that Congress acknowledged the continuing application of such purposes. As held in *Idaho II*, it was not necessary that "the purpose [of the 1873 Reservation] be extant at the time of congressional action." 210 F.3d at 1076. Nor does the history of congressional recognition foreclose the conclusion that "Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889." *Id.* Moreover, even if the facts supported Mr. Hart's legal conclusion that Congress initially "ratified" the Executive Order by providing financial support for it, any such initial confirmation of the Executive Order did not restrict Congress' authority to later establish different purposes for the Reservation. *See Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 2331 (2012) ("statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified [a]nd Congress remains free to express any such intention either expressly or by implication as it chooses"). Indeed, it was not uncommon for Congress to enact superseding legislation altering executive order reservations to meet new purposes after many years of legislation recognizing, and providing

financial support for, such reservations. The legislation that led to the creation of implied water rights in *Winters v. United States* is a prime example of such superseding legislation, as discussed in the following section.

B. SUPERSEDING CONGRESSIONAL ACTION MUST BE TAKEN INTO ACCOUNT IN DETERMINING THE PURPOSE OF THE RESERVATION.

The United States and the Tribe contest the State's assertion that the purposes of the 1891 Act supersede the purposes of the 1873 Executive Order. Their arguments lack both legal and factual support.

The President had authority to reserve public domain lands for Indian tribes as the result of an implied delegation of such authority from Congress. *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915). While executive orders can reserve water rights appurtenant to withdrawn lands,[3] it is Congress that is vested with ultimate authority to reserve lands and water rights "by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("noting that such congressional authority "applies to Indian reservations").

It is axiomatic that a later action by Congress addressing an Indian reservation supersedes an earlier executive order to the extent there is any conflict or difference between the presidential and congressional action. *See, e.g., Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942) ("the interest which the Indians received [in an executive order reservation] was subject to termination at the will of either the executive or Congress"). Thus, the fact that the President, in establishing the 1873 Reservation acted with the purpose of providing for the Tribe's subsistence needs does compel the conclusion that Congress

[3] The Tribe mistakenly argues on pages 21-23 of its brief that the State asserts that water rights cannot be reserved by executive order. The State makes no such assertion; rather, it argues only that the purposes of the 1873 Executive Order are irrelevant given its later supersession.

acted with the same purpose, particularly when the two actions were nearly two decades apart.

For such reasons, the Supreme Court has held that when Congress takes action to approve an agreement with a Tribe then residing on an executive order reservation, the terms of the agreement supersede the earlier executive order, which is "no longer of any force." *British-Am. Oil Producing Co. v. Bd. of Equalization of State of Montana*, 299 U.S. 159, 163, (1936). The United States attempts to avoid the foregoing decision by asserting, without basis, that the Court in *Idaho II* "rejected the argument that Congress created a new Reservation for the Coeur d'Alene after 1873." U.S. Br. 18. If anything, the decision in *Idaho II* affirms that the 1891 Act superseded the earlier Executive Order. The courts found affirmation of the Executive Order's reservation of submerged lands in the 1888 legislation directing that cession of the lakebed be obtained by tribal consent. 210 F.3d at 1074. Concurrently, the *Idaho II* courts recognized the superseding effect of the 1891 Act, which "bisect[ed] the Lake, with the northern two-thirds of Lake excluded from the reservation and the southern one-third of the Lake included within the new reservation boundaries." 95 F. Supp. 2d at 1113. Obviously, the 1891 Act could not have bisected the Lake without superseding the earlier Executive Order, which included almost the entirety of the Lake.

It defies reason to believe that the purposes of an Act bisecting the Lake so as to exclude 85% of said Lake, the entirety of the Coeur d'Alene River, and natural resources useful primarily for traditional subsistence, are the same as the purposes of the earlier Executive Order, which was expanded specifically to include the Lake and the Coeur d'Alene River and the subsistence resources those water basins provided. *Idaho II*, 95 F. Supp. 2d at 1109. The folly of such an assertion is seen in *Winters* itself, which, as here, addressed a reservation that was the result of an agreement to partially cede lands that had

been earlier set aside by executive orders. *See Winters v. United States*, 207 U.S. 564, 567-68 (1908) (describing agreement of May 1, 1888). The Court held that "[t]he case, as we see it, turns on the agreement," and never examined the purposes of the earlier executive orders. *Id.* at 575.[4] Neither the United States nor the Tribe attempt to explain why this Court should harken back to the purposes of the earlier Executive Order when the Court in *Winters* found no reason to do so in determining the purposes of the reservation established in the later, congressionally-ratified cession agreement.

1. In order to imply the reservation of a water right, the Court must determine the primary purposes of the Reservation as established in the 1891 Act.

The Tribe argues that the Court should not follow the holding in *United States v. New Mexico*, 438 U.S. 696 (1978), which established that the implied-reservation-of-water doctrine applies only "[w]here water is necessary to fulfill the very purpose for which a federal reservation was created." *Id.* at 702. This Court rejected a similar argument in SRBA Subcase 03-10022 (Nez Perce instream flows), and held that for all reserved water rights, whether for Indian or other reservations, "[t]he purpose being effectuated must be determined to be a primary purpose of the withdrawal as opposed to a secondary purpose."[5]

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[4] The agreement cited in *Winters* provided that one reason for requiring the cession of lands that resulted in the Fort Belknap Reservation was that the amount of lands in the earlier reservation was "wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their present or prospective wants." Act of May 1, 1888, 25 Stat. 113. Likewise, Congress, in requiring negotiations with Coeur d'Alene Tribe, noted that the 1873 Reservation included "more than 1,000 acres to each man, woman, and child." Sen. Misc. Doc. No. 36, 50 Cong., 1st Sess. (1888) (1st Strack Aff. Ex. 5).

[5] SRBA Consolidated Subcase 03-10022, *Order on Motion to Strike Testimony of Dennis C. Colson; Order on United States' and Nez Perce Tribe's Joint Motion to Supplement the Record in Response to the Objectors' Motions For Summary Judgement, I.R.C.P. 56(f); Order on Motion to Strike Exhibit Transcription of Letter From General Palmer to George Manypenny, Commissioner Of Indian Affairs; Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts, and Other Objectors Who Have Joined and/or Supported the Various Motions*, at 24 (SRBA Dist. Ct., Nov. 10, 1999). Hereinafter cited as "SRBA 03-10022 Summary Judgment Order."

The Tribe points to no superseding authority that requires the Court to depart from its prior conclusion, and its citation of *Potlatch Corp. v. United States,* 134 Idaho 916, 12 P.3d 1260 (2000), is particularly inapt: there, the Court distinguished water rights for wilderness areas from *Winters* rights for Indian reservations, and never discussed whether the primary purposes test of *New Mexico* should be applied to Indian reservations.[6] And, earlier this month, the Ninth Circuit affirmed the application of *New Mexico* to an Indian reservation and held that water "is not . . . reserved for secondary purposes." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.,* No. 15-55896 (Slip Op., March 7, 2017) (2017 WL 894471 at 4). Accordingly, the Ninth Circuit limited the Tribe's reserved water right to what it perceived as the reservation's "underlying purpose—to establish a home and support an agrarian society." *Id.*

C. EVEN ASSUMING THE 1873 EXECUTIVE ORDER WAS NOT SUPERSEDED, THE PRESIDENT COULD ONLY RESERVE WATER RIGHTS APPURTENANT TO THE LANDS SET ASIDE IN THE ORDER.

1. "Appurtenance," in the context of the reserved water rights doctrine, is limited to waters within or bordering a reservation.

When the President or Congress reserve land for specific purposes, such reservation can imply the reservation of "appurtenant water." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Importantly, the Court stated that the reservation of land may, by implication, include appurtenant "water," not appurtenant "water rights." That is a distinction with a difference: a water right may be appurtenant to lands far from the point of diversion, but the term "appurtenant water" implies a physical attachment or connection to the reserved lands.

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[6] For a further discussion of why the *New Mexico* holding applies to Indian reservations, see Idaho's response to the summary judgment motions of the U.S. and the Tribe, at 14-15 (discussing application of *New Mexico* in *Walton* and *Adair*); 17 (discussing application of primary purposes test in *Acquavella* litigation); and 19-20 (discussing why *Gila V* court erred in not applying *New Mexico*).

The requirement that there be a physical connection between a water body and reserved lands in order to imply the reservation of such water has been noted by commentators, who have stated: "Indian reservations are entitled to water rights in the streams running through and along the reservation." A. Dan Tarlock, *Law of Water Rights and Resources* § 9:38 (July 2016 Update). The United States attempts to rebut this plain statement of law by citing two secondary authorities: 2 W*aters and Water Rights* § 37.02(d) (Amy K. Kelley, ed. 3rd ed.), and David H. Getches, *Water Law in a Nutshell* 324 (3rd ed. 1997). U.S. Br. 37. The Kelley treatise, however, cites Getches as its sole authority; in turn, Getches cites only the award of water to the Cocopah Reservation in *Arizona v. California*, 373 U.S. 546 (1963), as confirmation that reserved water rights may be awarded "from every source now reasonably accessible to the reservation." Getches, at 348. As demonstrated in the State's response brief, however, reliance on the award of water to the Cocopah Reservation is misplaced, since it is undisputed that the intent of the Executive Order establishing the reservation was to reserve lands adjacent to the Colorado River. U.S. Br. Attachment D (Solicitor Op. of Dec. 21, 1972). The fact that the solicitor of the Department of Interior briefly reached another conclusion between 1955 and 1972 is irrelevant, since the Special Master in *Arizona v. California* made no reference to the solicitor's opinion. 1st Strack Aff. Ex. 17 (special master's report).

The United States asserts that the decision in *John v. United States*, 720 F.3d 1214 (9th Cir. 2013), supports its claim for instream flows miles upstream and downstream of the Coeur d'Alene Reservation. Such reliance on *John* is misplaced. First and foremost, *John* was not a reserved water rights case: the only issue before the Court was the validity of a federal regulation that defined the scope of "public lands" subject to regulation under the terms of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371 (1980). As

the Supreme Court has recently noted in related litigation over the scope of "public lands" subject to ANILCA, "ANILCA repeatedly recognizes that Alaska is different," so that regulations specific to Alaska don't have national applicability. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016).

The federal regulations at issue in *John* defining "public lands" in Alaska were intended to implement prior court holdings that reservation of water rights in a navigable waterway was a sufficient property interest to include the waterway under the term "public lands" as used in ANILCA. *John*, 720 F.3d at 1222. The federal regulations that implemented the prior holding by defining "public lands" to include "all non-navigable waters located on these [land units], on all navigable and non-navigable water within the exterior boundaries of the [land units], and on inland waters adjacent to the exterior boundaries of the [land units]." *Id.* (quoting 1999 Rules) (brackets in original).

In short, the *John* decision approved the agencies' determination that under the reserved water rights doctrine "appurtenant" waters "included waters within and 'immediately adjacent to' federal reservations, but not . . . waters upstream and downstream from those reservations." *Id.* at 1241. The Court did hold open the possibility that "the federal reserved water rights doctrine might apply upstream and downstream from reservations in some circumstances," *id.*, but such statement was dicta divorced from any particular facts.

Moreover, the Ninth Circuit Court of Appeals just issued an opinion addressing water rights on the Agua Caliente Indian Reservation, which affirms that appurtenant waters are "those waters which are attached to the reservation." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. 15-55896 (Slip Op., March 7, 2017) (2017 WL

894471 at 6). From the context of the opinion, the court was using the term "attached" in the physical sense.

2. By Its Terms and by Law, the 1873 Executive Order Could Only Reserve Lands and Waters Within Its Stated Boundaries.

If this Court should determine that the 1873 Executive Order was not superseded by the 1891 Act, then any reservation of water rights should be limited to appurtenant waters, i.e., waters within or bordering the reservation described in the order. The intent to so limit the Order is expressed in the plain terms of the Order, which provides that the "following tract of country in the Territory of Idaho be, and the same is hereby withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." Executive Order of November 8, 1873 (1st Strack Aff. Ex. 3). A metes and bounds description of the lands and water to be set aside then follows. The metes and bounds description defines and delimits the scope of the lands, waters, and resources set aside for the Tribe's then-subsistence needs. No intent to preserve instream flows at specific points far outside the metes and bounds of the Reservation can be discerned from the Executive Order.

The United States and the Tribe attempt to expand the scope of the Executive Order by asserting that it incorporated the terms of the unratified 1873 Agreement between the United States and the Tribe, particularly language included in the proviso stating rights reserved by the government, i.e., that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation."[7] In support of their

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[7] The provision reserving certain rights for the federal government provides:

> Which said Reservation the government of the United States, upon the acceptance of this agreement by Congress shall cause to be surveyed at its own expense, and the boundaries fully defined in accordance with this agreement. Provided that the said government reserves the right to establish in and across said reservation mail routes, military roads, and public highways for the benefit of the citizens of the United States. And provided further that the waters running into said reservation shall not be turned from their natural channel where they enter said reservation.

assertion that the Executive Order incorporated this provision, they cite a finding in *United States v. Idaho* that "an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement." 95 F. Supp. at 1109. The United States and the Tribe interpret this to mean that the Executive Order incorporated the provision providing that waters running into the reservation would not be turned from their natural channel.

But, Judge Lodge's statement that the Order "mirrored' the agreement was simply a paraphrase of his earlier finding that the Executive Order "mirrored exactly the legal boundaries delineated in the 1873 agreement." 95 F. Supp. at 1096. Certainly, the President could mirror the boundaries set forth in the Agreement, and, by the plain terms of the Order, did so. But, the President, even had he intended to incorporate the Agreement in the Order, could not have done so, for such incorporation would have usurped the authority that Congress reserved to itself to ratify all agreements with Indian tribes,[8] an authority expressed in the Agreement itself, which provided that its provisions, including the prohibition on turning aside of waters, would "be null and void and of no effect" if not ratified by Congress. 1st Strack Aff. Ex. 3. And, as pointed out in the State's opening brief, while Congress acquiesced to the President's authority to reserve lands and appurtenant waters, it had specifically provided that waterways on public domain lands would be available for appropriation without restrictions, thereby preempting any attempt by a President to reserve water rights on lands outside the boundaries of a federal reservation. *See* State

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U.S. Br. Attachment C.

[8] After Congress forbid treaties with Indian tribes in the Act of March 3, 1871, 16 Stat. 544, 566, "relations with Indians were governed by Acts of Congress . . . including legislating the ratification of contracts of the Executive Branch with Indian tribes . . . ." *Antoine v. Washington,* 420 U.S. 194, 203 (1975).

Opening Brief at 26-27 (discussing Mining Act of 1866, 14 Stat. 253; and Act of July 9, 1870).

Moreover, even if the President had the authority, and the intent, to incorporate the Agreement, such incorporation would not have reserved the right to maintain instream flows at specified points outside the Reservation boundaries, for the provision only prohibited the turning aside of waters "from their natural channel where they enter said reservation." Such a provision does nothing more than identify waters that would otherwise fall within the scope of the reserved water rights doctrine, and does not support a wholesale expansion of that doctrine to waters far upstream and downstream of the Reservation.

D. EVEN ASSUMING THE 1873 EXECUTIVE ORDER WAS NOT SUPERSEDED, THE CLAIMANTS HAVE NOT IDENTIFIED AN ADEQUATE BASIS FOR RESERVING WATER RIGHTS FOR FISHERY PURPOSES.

Even after hundreds of pages of briefing, the legal basis for the United States' instream flow claims remains murky. *Idaho II* established that the 1873 Reservation was "enlarged to include the Tribe's traditional fishing grounds," and "at the time of the 1873 Reservation . . . the capture of fish was an essential source of the Indian's food supply." 95 F. Supp. 2d at 1106 (internal quotation marks omitted). The inclusion of the fishing grounds, and the fact that the Reservation granted the Tribe "exclusive use" of those fishing grounds, *id.* at 1112, provided the Tribe the ability to protect fish habitat on reserved lands and prevent non-Indians from exploiting the fish resource.

Today, the situation is much different. The majority of the fishing grounds in the 1873 Reservation were ceded back to the United States in the 1889 Agreement, and the Tribe no longer has exclusive use of waterways within the Reservation, excepting the submerged lands under navigable waters held to be in tribal ownership in *Idaho II*. In fact, the vast majority of non-navigable waters in which the Tribe claims instream flows run

through portions of the Reservation that are exclusively owned by non-Indians, or nearly so. *See* Protective Order & attached map, Consolidated Subcase 91-7755 (Feb. 28, 2017).

In short, whatever right the Tribe had to protect fish habitat within the 1873 Reservation was implied from the setting aside of Reservation lands and waters for its exclusive use, a situation that no longer applies. Likewise, any power the Tribe had to protect its fishery from diminishment was based on its power to exclude others from the streams in which the fish spawn and rear.[9] Such power of exclusion no longer exists.

Thus, if a water right to protect tribal fisheries from diminishment is to exist, it must have a basis in an agreement, promise, or guarantee that the Tribe's implied fishing right would be protected against future diminishment as Reservation lands were ceded and the Reservation itself was opened and no longer set aside exclusively for tribal use. The agreements between the Tribe and the United States, however, are silent as to fishing rights. In past cases addressing water rights asserted to be necessary to prevent diminishment of tribal fishing, this Court has held that absent a provision providing the tribe "an absolute right to a predetermined or consistent level of fish," an "implied water right is not necessary for the maintenance of the fishing right." SRBA 03-10022 Summary Judgment Order at 33. While the Court there was addressing off-reservation claims, its reasoning applies equally to the Coeur d'Alene Tribe's implied, on-reservation fishing right.

In short, even if the Court were to find that the 1873 Executive Order was not superseded by the 1891 Act, it still should deny all instream flow fish habitat claims—if the Tribe lacks the right to prevent overfishing or other actions that may deplete fish populations below a protected level, then there is no basis for concluding that it nonetheless has instream flow water rights, which consist of the right to "prevent other appropriators

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[9] *See S. Dakota v. Bourland*, 508 U.S. 679, 689 (1993), (tribe's loss of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of land by others").

from depleting the streams waters below a protected level." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).

E. IMPLIED RESERVED WATER RIGHTS DO NOT PERSIST ON CEDED AND ALIENATED LANDS.

Even if the Court were to conclude that the Tribe possesses an implied right to protect its fisheries from diminishment, such right should be denied for all stream reaches outside the lands currently held in trust for the Tribe. Because the Tribe's rights and interests in those lands were alienated by a series of federal actions, the State will separately address the arguments of the United States and the Tribe as they relate to each such action, beginning with the 1873 Executive Order.

1. The Intent and Legal Effect of the 1873 Executive Order was to Extinguish All Tribal Property Rights Outside the Reservation Boundaries.

An additional reason for concluding that the 1873 Executive Order did not reserve instream flows at specific off-reservation points is that the intent, and legal effect of the Order, was to extinguish all off-reservation rights. First, the district court's findings in *Idaho II* confirm that the 1873 Executive Order, and the unratified 1873 Agreement, were motivated by the desire to obtain a relinquishment of the Tribe's claims to its aboriginal territory. The court found that north Idaho experienced an influx of emigrants in the 1860's leading to "apprehension over the effect of the Tribe's aboriginal title on non-Indian ownership claims." 95 F. Supp. 2d at 1102. The "influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a reservation and to obtain the Tribe's release of its aboriginal lands for settlement.." *Id.* at 1107. The Tribe would not agree to relinquishment without enlargement of their reservation, which led to the 1873 negotiations. "[T]he Federal Government could only achieve its goals-to extinguish aboriginal title and free tribal lands

for settlement-by agreeing to an expanded reservation." *Id.* at 1109. "In exchange for this enlarged reservation, and other compensation, the Tribe agreed to relinquish all claims to the remainder of its aboriginal lands." *Id.* at 1105. Judge Lodge's conclusion that the Agreement was intended to relinquish "all claims" to aboriginal lands cannot be reconciled with the assertion that the President nonetheless intended to reserve tribal rights to off-reservation streams, because such a reservation would have inhibited the goal of "free[ing] tribal lands for settlement." *Id.* at 1109. Because the United States and the Tribe assert that the 1873 Executive Order mirrored the terms of the 1873 Agreement, they must accept that it embodies the intent to extinguish all claims to the Tribe's aboriginal territory. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 357-58 (1941) (creation of executive order reservation "at the request of" tribe and "its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation").

2. Any Remaining Water Rights Outside the 1873 Boundaries Were Extinguished by the 1887 Agreement.

The assertion that the Tribe understood the 1873 Executive Order to have reserved instream flows at numerous off-reservation locations cannot be reconciled with the 1887 Agreement. Statements made during the negotiation of the 1887 Agreement confirm that the Tribe did not understand the 1873 Executive Order to have reserved rights to instream flows at off-reservation locations. The Tribe stated plainly that the land outside the reservation "is lost to us: it is dead to my people . . . we have given it up to the whites . . . [w]e are on only a small part of our country—I mean this reservation." Sen. Ex. Doc. 14, 51st Cong., 1st Sess. 78 (1889) (1st Strack Aff. Ex. 10).

Recognizing that it had "lost" all rights to lands outside the 1873 Reservation, the Tribe agreed to "cede, grant, relinquish, and quitclaim to the United States all right, title, and

claims which they now have, or ever had, to all lands . . . except the portion of land within the boundaries of their present reservation . . . ." 26 Stat. at 1027 (emphasis added). While the Tribe may assert that it would not have understood the cession of "all lands" to include water rights, such an assertion cannot be reconciled with the plain terms of the Agreement, because both the cession clause and the reservation clause refer to "land."

In other words, if the Tribe understood the reservation of "land" to include waters and water rights, it likewise would have understood the identical term, when used in the cession clause, to include waters and water rights. The canons of construction favoring Indian tribes do not compel the Court to construe the same term to mean two different things in a single sentence.

Moreover, in prior proceedings before the Indian Claims Commission ("ICC"), the Tribe sought, and received payment, for, the extinguishment of all water rights in the territory ceded in the 1887 Agreement. The Tribe's appraiser, in valuing the ceded lands, "took into consideration the value of water rights," using numerous water claims for mining as the touchstone, and assigned the water rights a separate value. ICC, Dkt. No. 81, *Add'l Findings of Fact* at 6-27, 6-28 (Dec. 3, 1957) (Strack 4th Aff. Ex. 33). Additionally, the Commission made a finding that the "streams and waters of the Coeur d'Alene Tract are not and could not be separately evaluated," so that "[w]ater and its use and need is necessarily included in the valuation of the lands of the Tract." *Id.* at 6-18. The Tribe asserts that such compensation was "only for the loss of off-reservation water rights for agriculture, timber, and mining purposes," because "the Commission made no finding that it was compensating the Tribe for the 'highest and best' uses of either the land or water at issue." Tribe Br. 92-93. The Tribe is simply wrong: the Commission expressly found that "[t]he appraisers for the parties in this litigation agree that the highest and best use of the lands of the Tract fits

into three classifications: (1) agricultural lands, (2) timber lands and (3) mineral lands." ICC, Dkt. No. 81, *Opinion of the Commission* at 6-57 (Dec. 3, 1957) (Strack 4th Aff. Ex. 34). *See Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (2985) (when tribe agreed that highest and best use of land for purposes of valuation was lumbering and livestock grazing, the resulting compensation included other uses, such as hunting and fishing rights, even if not separately valued).

Thus, the ICC decision provides conclusive proof that the 1887 Agreement extinguished any water rights that the Tribe may have then held in the territory that the Tribe ceded. In *W. Shoshone Nat. Council v. Molini*, 951 F.2d 200 (9th Cir. 1991), the court held that a "[Commission proceeding and subsequent] payment for the taking of a [sic] aboriginal title establishes that the title has been extinguished." *Id.* at 202 (quoting *United States v. Dann*, 873 F.2d 1189 (9th Cir.1989)) (brackets in original).

Contrary to the Tribe's assertions, the holding in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), does not alter the unambiguous extinguishment of all off-reservation rights in the 1887 Agreement. In *Mille Lacs,* the Tribe had entered into an 1837 treaty with the United States ceding certain lands east of the Mississippi River in Minnesota and Wisconsin and reserving the "privilege of hunting, fishing, and gathering . . . upon the lands, the river and the lakes included in the territory ceded." *Id.* at 177. Eighteen years later, the Tribe entered into another treaty whereby it ceded additional lands in Minnesota and included a catch-all provision ceding "all right, title and interest . . . to any other lands in the Territory of Minnesota or elsewhere." *Id.* at 184. The State of Minnesota asserted that the hunting rights reserved in the 1837 Treaty were an interest in land and therefore extinguished by the latter provision. *Id.* at 195.

The Court found that given the legislative history of the 1855 Treaty, including the 1837 treaty's separation of hunting rights from land ownership and a statement by a key senator that the new treaty would reserve all rights secured by former treaties, the Court concluded that there was a "plausible ambiguity" that the cession of all interests in lands was not intended to include the previously-reserved usufructuary right to enter previously-ceded lands to hunt or fish. *Id.* at 200.

In short, because "the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership . . . there is no reason to believe that the Chippewa would have understood a cession of a particular tract of land to relinquish hunting and fishing privileges on another tract of land." *Id.* at 201-02.

The situation addressed in *Mille Lacs* is easily distinguished from the Coeur d'Alene Tribe's 1887 Agreement. First, in *Mille Lacs*, the 1855 cession was geared to a particular tract of land, and the hunting and fishing rights at issue applied to a different set of lands entirely, creating a plausible ambiguity that the Tribe may not have understood itself to be ceding rights on the lands it had previously ceded. There is no such ambiguity in the 1887 Agreement. The water rights claimed by the Tribe were plainly within the territory to which the Tribe ceded "all right, title, and claim."

Second, and even more importantly, *Mille Lacs* was addressing hunting and fishing rights that had been explicitly segregated from the land, so that they "existed independently of land ownership." *Id.* at 201. Here, there was no such explicit segregation of water rights from the ceded lands, either in the 1873 Executive Order or the 1887 Agreement. Absent a provision segregating water rights from the land, there is no basis for concluding that the cession of all right, title and claim to lands would not have been understood by the Tribe to include water rights in the ceded territory.

Another critical fact the United States and Tribe omit is that the commissioners sent to negotiate the 1887 Agreement were given a copy of the 1873 Agreement when they reached the Reservation. Sen. Ex. Doc. 14, 51st Cong., 1st Sess. 55 (1889) (1st Strack Aff. Ex. 10). Yet, neither the commissioners nor the Tribe thought to include a provision analogous to that in the 1873 Agreement providing that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation." Thus, even if the Tribe were correct in asserting that such provision was intended to reserve water rights throughout its aboriginal territory, its omission in the 1887 Agreement, which in every other way supersedes the prior, unratified agreement, precludes such assertion.

In sum, the plain language of the 1887 cession agreement, the omission of any provision addressing water rights, and the ICC decision explicitly compensating the Tribe for the loss of all water rights in the 1887 ceded territory all compel a conclusion similar to the conclusion this Court reached in SRBA Subcase 03-10022, which also addressed claims for instream flows on ceded lands:

> Because one of the admitted purposes of the Treaty was to extinguish aboriginal title to make the lands available for settlement, it is inconceivable that either the United States or the Tribe intended or even contemplated that the Tribe would remain in control of the water.

SRBA 03-10022 Summary Judgment Order at 38.

3. Any Water Rights in the Northern Third of the 1873 Reservation Were Extinguished in the 1889 Agreement.

Assuming solely for purposes of argument that instream flow water rights were reserved within the 1873 Reservation, the Tribe ceded any right it may have had to instream flow water rights in the ceded portion of the Reservation when it agreed to the provisions of the 1889 Agreement. Because the Executive Order did not explicitly address water rights, any water rights the Tribe may have possessed inside the 1873 boundaries, including

instream flow water rights, were implied by the reservation of lands, and therefore appurtenant to the reserved lands. The Tribe admits as much when it asserts that any water rights reserved by the Executive Order were *Winters* rights, and not a reservation of pre-existing rights. Tribe Br. 71 n. 21. Because any instream flow water rights within the 1873 boundaries would have been appurtenant to reserved lands, the cession of such lands necessarily included any water rights.

This is so for several reasons. First, the courts in *Idaho II* examined the purposes and terms of the 1889 cession agreement, and found that "the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation." 95 F. Supp. 2d. at 1113. Both the Ninth Circuit and the Supreme Court agreed that "the Tribe agreed to cede . . . the northern two-thirds of the Lake." 210 F.3d at 1071; *see also* 533 U.S. at 269-70 (the parties "reached a new agreement under which the Tribe would cede . . . approximately two-thirds of Lake Coeur d'Alene").

It appears undisputed that as a result of the 1889 Agreement, the Tribe ceded all water rights to the northern two-thirds of the Lake, as demonstrated by the fact that the Lake level maintenance claim, 95-16704, identifies the place of use as "[t]hat portion of Lake Coeur d'Alene and its related water that are located within the boundary of the Coeur d'Alene Reservation." *See also* U.S. Br. at 57 [([t]he federal reserved water right does not seek to control the entire Lake").

If the 1889 Agreement excluded a portion of the Lake from the Reservation, so that the Tribe has no claim to a water right in the excluded portion, such reasoning applies equally to instream flow water right claims on rivers and streams within the 1889 ceded territory. The United States offers no explanation as to why the cession precludes a water

right in the northern part of the Lake but does not preclude water rights on other water bodies included in the cession.[10]

A second, and even more compelling reason for denying instream flow claims within the territory ceded in 1889 is the plain language of the cession agreement, which, like the 1887 cession, states the Tribe's agreement to "cede, grant, relinquish and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following described portion of their reservation . . . ." 26 Stat. at 1030. The Tribe argues that the 1889 Agreement was a "land cession agreement," and did not necessarily include water rights. Tribe Br. 27. But, the cession language is for a "portion of their reservation," and does not speak in terms of "lands." If, indeed, the Tribe asserts that they understood the 1873 Reservation to include water rights, then they would have likewise understood an express cession of such "reservation" to include water rights. As stated earlier, the canons of construction favoring Indian tribes do not compel the Court to construe the same term to mean two different things in the same agreement. Indeed, the Court has warned against constructions that create such a "glaring inconsistency" in the structure of the agreement. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770 (1985).

Third, the 1889 cession is silent with regard to any retention of rights on the ceded portion of the Reservation, and the Supreme Court has rejected assertions that "silence itself, viewed in historical context, demonstrates an intent to preserve" rights on ceded lands. *Id.* at 770-71. The United States and the Tribe have not directed the Court to any authority for the proposition that silence with regard to water rights on the ceded portion of a reservation

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[10] The following instream flow claims are within the boundaries of the 1889 cession: Wolf Lodge Creek (lower portion), Cougar Creek, Mica Creek, Turner Creek, Beauty Creek, Fighting Creek (upper portion), Lake Creek (upper portion), Carlin Creek, and the lower stretch of the Coeur d'Alene River. Source: Dudley Reiser, *Rebuttal Report on the Importance and Biological Attributes of the Fisheries of the Coeur d'Alene Reservation*, at 8.

implies that such rights were preserved. The holding in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), is not to the contrary: there, the right to hunt and fish on ceded lands had been expressly reserved in an earlier treaty—so the question before the Court was not the reservation of rights by silence, but whether a cession of certain rights in "land" included hunting rights that had been separated from land ownership. No such assertion is possible here, since there was never an agreement to separate water rights on the 1873 Reservation from land ownership. Thus, the cession of a portion of the Reservation could not, through silence, have reserved the right to maintain instream flows on streams within the ceded tract.

4. As Lands Within the Current Reservation Were Alienated, All Appurtenant Water Rights Were Extinguished.

The map filed by the Tribe pursuant to this Court's Protective Order demonstrates that, with few exceptions, the vast majority of instream flow claims within the boundaries of the Reservation run through those portions of the Reservation that have been alienated in fee to non-Indians. As discussed in previous briefing, such alienation was the result of the Act of June 21, 1906, which allotted 160 acres to each tribal member, and opened up the remaining lands to settlement and entry under the homestead laws. 34 Stat. at 335. One thousand, three hundred and fifty non-Indian homesteads were established on the Reservation in the next few years. State of Idaho's Statement of Additional Facts ¶ 57. Later, tens of thousands of acres of allotments were alienated to non-Indians by the allottees. *Id.* ¶ 58.

The United States and the Tribe continue to assert that non-consumptive reserved water rights survived the alienation of lands within the boundaries of the Reservation. Such arguments ignore the myriad federal court decisions addressing the consequences of alienation on reserved rights—in short, rights implied from the reservation of lands for a

tribe's exclusive use cannot be exercised on lands alienated in fee to non-Indians, absent express congressional action transforming implied rights into a usufruct or servitude that can survive such alienation.

The principles underlying the decision in *Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981), are dispositive. *Blake* addressed a tribe's right to enter alienated lands within its reservation to exercise fishing rights—such fishing rights were implied by the purposes of the reservation, but had never been expressly reserved or created. *Id.* at 911. The Tribe attempts to limit *Blake* to the issue presented therein, i.e., the right to access private property to exercise fishing rights. Tribe Br. 32. But *Blake* stands for the proposition that when land within a reservation is alienated in fee to non-Indians, such land is not encumbered by any property interest that the Tribe may have previously held in the property, unless such property interest is specifically reserved. In short, alienated lands are "not subject to any interest in the lands that might be implied from the mere creation of the reservation." *Id.* at 911. This principle applies as well to instream flow water rights as it does to access rights. Indeed, if anything, the case for denying tribal water rights on alienated lands is even more compelling than the case for denying access rights, because non-consumptive water rights consist of the right to "prevent other appropriators from depleting the streams waters below a protected level." *Adair*, 723 F.2d at 1411. Such a right is, by nature, at odds with the very purpose for which the lands were opened to homesteading—to allow settlement and development of the lands.

The Tribe's citation of *State v. McConville*, 65 Idaho 46, 139 P.2d 485 (1943), does not conflict with the holding in *Blake*. Unlike *Blake*, which addressed a right implied from the setting aside of the reservation, *McConville* addressed the Nez Perce Tribe's explicitly-reserved treaty right to fish within the reservation boundaries without acquiring a state

fishing license. Such right persisted after the allotment and opening of the reservation because the fishing right was not implied from tribal ownership of lands, but existed separate and apart from such ownership. Moreover, the *McConville* Court held only that the right was a right of freedom from state licensure: it did not hold that the Tribe held any property interest or right of access to alienated lands—in fact, it found "[t]here is . . . no question of trespass in this case, the sole question being the right to fish without a fish and game license." *Id.* at 51, 139 P.2d at 487. Thus, *McConville* does nothing to support the Tribe's assertion of an implied property right to instream flows on alienated lands.

This Court must also reject the United States' suggestion that the instream flows it seeks on behalf of the Tribe are analogous to instream flows based on state regulatory laws. The alienation of reservation lands, with few exceptions, extinguishes a tribe's right to regulate and preserve natural resources and wildlife populations on the alienated lands. In *Montana v. United States*, 450 U.S. 544 (1981), the Court struck down a tribal ordinance seeking to prohibit non-Indians from hunting on former allotments that had been alienated to non-Indians. The Court held that the tribe could not regulate hunting and fishing on nonmember lands. *Id.* at 559. In doing, so, it found it unnecessary to determine whether Congress specifically intended to abrogate such authority—rather, the Court unequivocally stated that "what is relevant . . . is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." 450 U.S., at 560. In short, alienation of reservation lands, with few exceptions, extinguishes tribal regulatory rights—no showing of specific intent to abrogate rights is required. As the Supreme Court explains, "regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-

existing Indian rights to regulatory control." *South Dakota v. Bourland*, 508 U.S. 679, 692 (1993) (footnote omitted).

The decisions in *Blake*, *Montana*, and *Bourland* affirm that on the alienated portions of the Coeur d'Alene Reservation, the Tribe can claim no property right in alienated lands, and cannot restrict the use of such lands in order to preserve natural resources thereon that serve traditional subsistence needs. Indeed, if a tribe cannot preserve fish resources by prohibiting the direct taking of fish on alienated lands, how can it assert the right to preserve fish resources by prohibiting reductions in instream flow fish habitat on alienated lands? The plain answer is that it cannot.

The United States and the Tribe further err in asserting that the Ninth Circuit decisions in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), and *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1983), recognize a tribal right to instream flows to preserve fish habitat on the alienated portions of the Reservation. As discussed at length in the State's response brief, these cases only addressed the narrow factual question of small-scale replacement fisheries on limited stream reaches under tribal control. *Walton*, 647 F.2d at 48; *United States v. Anderson*, 591 F. Supp. 1, 8 (E.D. Wash. 1982). Nothing in either *Walton* or *Anderson* suggests that either tribe had a right to preserve instream flows on alienated lands throughout the reservation. In both cases, pre-existing native fisheries had been lost due to development, and the court never suggested that such development violated any tribal right to preserve fisheries existing at the time the reservations were set aside. Indeed, the court noted the unique nature of the replacement fishery water rights when it noted that "the nature of a right to use water for a replacement fishery is such that it cannot coexist with continuing rights to water for a fishery in the watershed where the fishery historically existed." *Walton*, 647 F.2d at 48. Moreover, neither case reached the issue of whether the

Tribe may assert instream flow rights on streams running through alienated lands—at most, they recognize the un-extraordinary proposition that once an instream flow right is established on a stretch of waterway, non-Indians upstream of the protected reach with lower-priority water rights must refrain from diversion to the extent necessary to deliver the water to the place of use.

Finally, the Tribe's repeated citation of *City of Pocatello v. State*, 145 Idaho 497, 180 P.3d 1048 (2008), is simply misplaced. *City of Pocatello* does not address the question of whether a tribe retains reserved water rights on lands ceded to non-Indians—rather, the only question was whether a statutory provision relating to a cession of reservation lands gave the non-Indian homesteaders a federal water right on waterways within the Reservation. The Court held that vesting the homesteaders with a portion of the Tribe's reserved water rights would abrogate the Tribe's rights and could not be lightly implied. Here, neither the State nor the objectors assert that the alienation of Reservation lands vested the purchasers with any portion of the Tribe's reserved water rights. Rather, the State asserts only that when Reservation lands ceased to be reserved for tribal use, all appurtenant reserved water rights, whether consumptive or non-consumptive, likewise ceased to be reserved for tribal use. Such assertion is entirely consistent with the *City of Pocatello* decision, which did not suggest that the Tribe retained any water rights or other property rights in the ceded lands.

In sum, with regard to water right claims on alienated lands, the Court should first look to the purposes of the 1891 Act, the primary purposes of which do not support the Tribe's claims for instream flows. But, in the event the Court were to conclude otherwise, instream flows on stream reaches within the alienated portions of the Reservation should be denied for the reasons set forth herein and in earlier briefing. The very act of alienation is irreconcilable with the assertion that the Tribe retains an implied property interest in

alienated lands that allows it to protect the streams from development. The Supreme Court has held repeatedly that even an express treaty right, and particularly a right of exclusive use, may cease to have application when such right "clashes with the subsequent history of the reservation," particularly alienation of lands in fee simple. *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 174 (1977). Here, the Court cannot simply apply the purposes of the 1873 Executive Order, which "create[d]a reservation for the exclusive use of the Tribe," 95 F. Supp. 2d at 1109, without accounting for the subsequent alienation of the vast majority of reservation lands and waterways.

F. THE CLAIM OF A WATER RIGHT FOR LAKE LEVEL MAINTENANCE SHOULD BE DENIED.

1. The Claimed Instream Flow at Post Falls is an Integral and Impermissible Component of the Lake Level Maintenance Claim.

Both the United States and the Tribe attempt to describe their lake level maintenance claim, Claim No. 95-16704, as a benign, "in situ" water right that is "limited to 'those submerged lands where title is quieted in favor of the United States for the benefit of the Coeur d'Alene Tribe.'" Tribe Br. 42; U.S. Br. 58. The Tribe later alleges that the claimed water rights "could not 'prevent storage' in the Lake [because] [s]o long as lake elevation were above the claimed levels the water right would be satisfied." Tribe Br. 59. The Tribe also alleges that the claim is "not contingent on dam removal or any other occurrence but would be effective as soon as decreed." *Id.*

The United States and the Tribe do not appear to understand their own claim. The lake level claim is not limited to an "in situ" water right within the Reservation; rather, it asserts a right to specified instream flows immediately below Post Falls Dam. And those flows, despite the protestations of the Tribe and the United States to the contrary, Tribe Br. 43, would, if implemented, prevent storage of water in Coeur d'Alene Lake. The United

States' characterization of the claimed outflow as a "quantification issue that need not be determined at this time," U.S. Br. 61, rings hollow. The Tribe's entitlement to an instream flow on a river miles outside the Reservation that the Tribe specifically ceded is at the heart of the entitlement issue—moreover, the claimed outflow is inseparable from the Tribe's claim that it reserved the right to maintain "natural Lake processes" as they existed "prior to Post Falls Dam."[11]

The claimed instream flow should be denied outright, for the reasons stated earlier in this brief with regard to instream flows outside the Reservation. Additionally, the claimed instream flow should be denied as inconsistent with the plain terms of the 1891 Act, which as the Supreme Court has found, ratified the Tribe's conveyance of the Spokane River channel to Frederick Post. 533 U.S. at 279-80. Not only is the Tribe's last-minute attempt to raise suspicion as to the efficacy of such conveyance collaterally estopped by the Supreme Court's decision, but its evidence, which consists of an affidavit from E. Richard Hart, is impeached by Mr. Hart's own testimony in *Idaho II*. There, Mr. Hart stated that the conveyance to Post was "ratified and made law by Congress," and further asserted that it was evidence that all parties understood the riverbed to belong to the Tribe: "this agreement is important because it indicates that both the United States and Seltice were firmly aware of the value and importance of river channels and that this cession of such property had been made with all parties aware of riverbed values." 4th Strack Aff. Ex. 35 at 234.

Neither the Tribe nor the United States attempt to explain how the Court may imply a tribally-held instream flow in a river channel that they expressly ceded. Nor could they. The plain language of the 1891 Act cedes any right the Tribe may have had to control flows

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[11] The claim states that "the outflows will not be required during the effective period of the FERC License," but that appears to be a statement that the United States or Tribe will elect not make a water call during the license term, rather than a request to include such a condition in the decree.

at the ceded location: in the plainest language possible by confirming the Tribe's cession "to Frederick Post the place now known as Post Falls . . . to improve and use the same (water power)." 1891 Act, 26 Stat. at 1031. Given the plain language of the 1891 Act, and its express recognition that Post would use the stream flow to generate water power, the claimed outflows at Post Falls cannot be awarded.

Because the claimed outflows are a necessary component for maintenance of a natural hydrograph, the most logically consistent action is to deny the claim in its entirety. Assuming, solely for purposes of argument, that the "in situ" portion of the claim is segregated from the claimed instream flow, the Court should still deny the claim. The State, in its response brief, described at length the holdings in *Idaho II* confirming that the 1889 Agreement purposefully and deliberately bisected the Lake and excluded the northern two-thirds of the Lake (or 85% by area) from the reservation. The United States and the Tribe argue that such division of the Lake does not affect their claim, for it is often the case that a federal reserved water right is for a portion of a water body that extends outside of, or upstream of, a federal reservation, thus restricting diversions far outside the reservation. Such fact is not in dispute. Nor does the State assert that impacts on off-reservation water users are a basis for denying a reserved water right claim. Rather, the State asserts, for the reasons stated in its earlier briefs, that there is nothing in the plain language of the 1889 Agreement, nor any statements in the negotiations thereof, that would support the conclusion that the Tribe understood itself to have reserved the right to control the elevation of Coeur d'Alene Lake despite having ceded Post Falls, the Spokane River, and 85% of the Lake.

The Tribe attempts to avoid the implications of such cession by alleging that the 1889 Agreement could not be construed as ceding water rights in the Lake, or by implication the

Lake itself, because the legislation authorizing treaty negotiations only mentioned "lands." Tribe Br. 53. The Tribe's argument, however, cannot be reconciled with the holding in *Idaho II*, which found that "the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation." 95 F. Supp. 2d at 1113. Likewise, the Tribe's citation of *Minnesota v. Mille Lacs Band of Chippewa Indians* for the proposition that an agreement to cede "lands" cannot terminate usufructuary privileges is not applicable to the water rights at issue here: the claimed lake level maintenance right is alleged to arise from, and be appurtenant to, the reservation of the lakebed and surrounding lands for the use of the Tribe. There has been no allegation, or evidence, that either the Tribe or the United States intended to create a lake level water right that was segregated from land ownership—the very definition of a usufruct. *See Black's Law Dictionary* 1542 (defining "usufruct" as the "right to use and enjoy the fruits of another's property for a period without damaging or diminishing it") (8th ed. 2004).

2. The Lake Level Claim Assumes a Hypothetical and Speculative Scenario that Is Unlikely to Occur Given Superseding Federal Legislation.

As stated in the State's opening brief, another reason to deny the lake level claim is its speculative nature, arising from the fact that the claim would have no application until 2059 at the earliest, the year the current 50 year hydropower license for Post Falls Dam expires.[12] Non-consumptive water rights are quantified by reference to the amount of water needed "to provide the Indians with a livelihood—that is to say, a moderate living" at the time of quantification. *Adair*, 723 F.2d at 1415. Thus, determining the amount of water necessary to provide the Tribe a modest living would require the court to speculate as to what the Tribe's needs would be in the year 2059.

[12] The term "speculative" is used here, and in the State's opening brief, in its normal, judicial sense, i.e., preventing adjudication based on speculative evidence, not as a term of art applicable to water right speculation. See Tribe Br. 60.

The United States and the Tribe attempt to carve out an exception for reserved water rights by asserting that court decisions allow quantification by predicting a Tribe's future needs. But this is not so, particularly for non-consumptive water rights. In *Arizona v. California*, 373 U.S. 546 (1963), the Court rejected Arizona's assertion that "the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs'" because "[h]ow many Indians there will be and what their future needs will be can only be guessed." *Id.* at 600-01. Thus, practicably irrigable acreage is determined using current technology, not future needs, on the assumption that such quantification provides for full development of all lands set aside for tribal farming purposes.

But, when addressing a non-consumptive water right, a tribe is "not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource." *Adair*, 723 F.2d at 1415. Rather, the right is based on subsistence needs as exercised at the time of quantification. Here, there would be no way to determine whether the claimed water right fulfills the moderate living standard, since the amount of water in the Lake is controlled by Post Falls Dam. The Court would be forced to speculate based on projected needs and conditions in 2059 or later, an analysis clearly foreclosed by the *Arizona v. California* decision.

This is not merely a quantification issue. The lake level claim addresses a purely hypothetical future scenario wherein FERC determines to either cancel, or not renew, the hydropower license at Post Falls. Whether the Tribe will ever be entitled to "maintenance of the Lake's natural elevation, " as stated in Claim No. 95-16704, is itself an entirely speculative question, for the Tribe has no right to require maintenance of natural lake levels so long as the current FERC license, and successor licenses, are in place. Nor does the Tribe have any right to require removal of the FERC-licensed facility. Congress, in enacting the

Federal Power Act [FPA], rejected a proposal requiring tribal consent to hydropower licenses. *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands of Mission Indians*, 466 U.S. 765, 787 (1984). Citing that history, the Supreme Court has held that tribes lack any "special authority to prevent the [Federal Energy Regulatory] Commission from exercising the licensing authority it was receiving from Congress." *Id.* Thus, regardless of treaty terms, a tribe may not "override Congress' subsequent decision that all lands, including tribal lands, could, upon compliance with the provisions of the FPA, be utilized to facilitate licensed hydroelectric projects." *Id.*[13]

Here, so long as the hydropower license for Post Falls remains in place, water levels in Coeur d'Alene Lake are determined and controlled by the terms of the license. The Tribe, despite the assertion that its claim is not contingent on dam removal, Tribe. Br. at 59, would be precluded from taking any action to enforce its water right.

Because, under the facts as they currently exist, there is no assurance, or even reasonable contemplation, that the Post Falls hydropower license will at some future point cease to apply, there is simply no rights that can be adjudicated: "[f]or [a] Court to act, '[there] must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Noh v. Cenarrusa*, 137 Idaho 798, 802, 53 P.3d 1217, 1221 (2002) (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)).

G. RESERVED WATER RIGHTS FOR AGRICULTURE ARE LIMITED TO ARID LANDS THAT REQUIRE IRRIGATION TO BE PRODUCTIVE.

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[13] In a footnote, the Court likewise rejected the argument that a tribe could invoke its "sovereign power" to prevent a FERC-licensed hydropower project from proceeding without tribal consent. 466 U.S. at 787 n.30.

The State continues to assert that water rights are implied for irrigation purposes only where irrigation is necessary to make the land productive. Starting with *Winters* itself, the *Winters* doctrine has been applied only where the reserved lands were "dry and arid character, and, in order to make them productive, require large quantities of water for the purpose of irrigating them." *Winters*, 207 U.S. at 566; *id.* at 576 (noting that reserved lands "were arid, and, without irrigation, were practically valueless"). Likewise, in *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 339 (9th Cir. 1939), the Ninth Circuit implied intent to reserve water for irrigation because "[i]t would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive."

In short, despite the United States' assertions to the contrary, past decisions have implied an entitlement to water for irrigation only when irrigation was necessary to make the land productive; no case suggests that intent to reserve water can be implied simply because irrigation will make productive land even more productive. This conclusion is inherent in *Winters* and *Walker River*, and finds additional support in the Supreme Court's decision in *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). As the United States points out, the case crafted a "moderate living standard" and applied it to a shared salmon harvest, but, the Court explicitly grounded its standard on the water right decisions in *Winters* and *Arizona v. California*, 373 U.S. 546, 600 (1963). *See Fishing Vessel Ass'n* at 686. The Court's citation of *Winters* as support for a moderate living standard is further confirmation that the reservation of irrigation water is implied where necessary to assure the Tribe can make a moderate livelihood from farming. Such implication is not present when the land is arable and productive without irrigation.

H. RESERVED WATER RIGHTS FOR DCMI, IF RESERVED AT ALL, ARE LIMITED TO THOSE AMOUNTS NECESSARY FOR THE TRIBE'S NEEDS, NOT THE NEEDS OF NON-INDIAN VISITORS.

The United States mistakenly asserts that the State seeks to limit water rights for industrial purposes to "those types of industrial uses contemplated in 1891," so that the Tribe cannot "take advantage of modern technology" to achieve economic development. U.S. Br. at 45, 55. Such is not the case.

Rather, the State's argument is limited to the unremarkable proposition that reserved water rights for industrial and commercial purposes should be limited to those water rights necessary to achieve the primary purpose of the Reservation. Indeed, in those cases where a reservation, such as the Coeur d'Alene Reservation, had a primarily agricultural purpose, courts have typically declined to find any reservation of water rights for commercial and industrial purposes.[14] Tellingly, the United States provides scant primary authority to the contrary aside from some dicta from *In re the General Adjudication of All Right to the Use of Water in the Gila River System*, 35 P.3d 68 (Ariz. 2001), a case which provides little reliable guidance for the reasons discussed in the States response brief. The United States' additional citation of *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) is puzzling, since it contains no reference to either "homeland" water rights or DCMI water rights. And the United States' reliance on the *Greely* decision for the proposition that water "may" be necessary for industrial purposes is especially inapt, for the court's entire holding stated: "It may be that such "acts of civilization" will include consumptive uses for industrial purposes. We have not found decisive federal cases on the extent of Indian water rights for uses classed as "acts of civilization." *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 712 P.2d 754, 765 (1985).

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[14] See pages 47-49 of the State of Idaho's Memorandum in Support of Motion for Summary Judgment and cases discussed cited therein, concluding that water rights for industrial and commercial purposes were not in fulfillment of the primary purposes of various Indian reservations.

Second, water rights for DCMI purposes, as with all other water rights, should be limited to rights necessary to achieve the primary purpose of the Reservation. Here, the Reservation was set aside for the Tribe's use and occupation, to be held "as Indian lands and as homes for the Coeur d'Alene Indians," so as to "best promote the progress, comfort, improvement education, and civilization of said Coeur d'Alene Indians." Everything in the 1891 Act contemplates that the reserved lands and waters would be used exclusively by the Tribe. Nothing in the 1891 Act contemplates non-Indian use and occupation of tribal lands. Thus, water to support facilities that primarily serve non-Indians, including casinos, hotels, and golf courses, is a secondary use of the Reservation. No one denies that such facilities promote economic development and are of great benefit to the Tribe, but the mere fact that an activity promotes economic development is not sufficient to establish that such activity is a primary purpose of the Reservation. If that were so then reserved water rights for DCMI purposes would be common, rather than rare.

I. THE PRIORITY DATE FOR ALL WATER RIGHTS ON REACQUIRED LANDS IS THE DATE OF REACQUISITION.

The United States and the Tribe assert that the decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*), adopted an original date of priority for all reacquired lands. The court, however, was addressing the priority date of water rights on lands where the intervening non-Indian owners had succeeded to the original allottee's water right, had put such water to beneficial use, and thus retained the reservation priority date. In such cases the Tribe, upon reacquisition, was likewise entitled to the original priority date. *Id.* at 114. The court never addressed the priority date of reacquired lands where the intervening non-Indian owner had not succeeded to the allottee's water right or had obtained a water right with a later priority date under state law.

Given the lack of any discussion in *Big Horn I* as to the priority date of water rights on lands on which the non-Indian owner did not succeed to the water right of an allottee, the holding in *United States v. Anderson* is controlling. There, the Court held explicitly that "homesteaded lands where the water rights has not been perfected or the rights have been lost, will have a priority date as of the date of reacquisition." 736 F.2d 1358, 1361 (9th Cir. 1984). This is so because "where the land has been removed from the Tribe's possession and conveyed to a homesteader, the purposes for which *Winters* rights were implied are eliminated." *Id.* at 1363. In other words, upon reacquisition, the Tribe acquires only those property rights held by the person selling the property to the Tribe. If the seller did not succeed to the original *Winters* right, or held no water right at all, then any water right the Tribe holds is necessarily a "new" water right, with a priority date based on the date of reacquisition. *Id.* at 1361.

While the United States and the Tribe assert that the *Anderson* holding can only apply to irrigation water rights, that cannot be the case: in fact, the court's holding that upon alienation "the purposes for which *Winters* rights were implied are eliminated" applies with even greater force to communal, non-consumptive rights than it does to consumptive irrigation rights. It is well established that Congress intended that alienation of reservation lands to non-Indians, whether by homesteading or purchase of former allotments, would extinguish all property rights previously held by the Tribe, so that the non-Indian purchaser acquires unencumbered title. *Blake v. Arnett,* 663 F.2d 906, 911 (9th Cir. 1981). As the court found in *Blake*, this principle applies to property rights belonging to the tribal community, such as the right to use land for hunting or fishing. Neither the United States nor the Tribe attempt to explain why a water right held for the benefit of the tribal community would be any exception. That being the case, any right the Tribe may have had to use water for fish

habitat or other non-consumptive community purposes was extinguished when the land was alienated to non-Indians. Any right to use the land starts upon the date of reacquisition. Likewise, any water right on the reacquired land, whether consumptive or non-consumptive, should have a priority date as of the date of reacquisition.[15]

II. CONCLUSION

For the reasons stated here, the State of Idaho respectfully submits that the Court should deny the summary judgment motions of the United States and the Coeur d'Alene Tribe, and grant the summary judgment motion submitted by the State.

Respectfully submitted this 17th day of March, 2017.

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[15] Similar reasoning applies to allotments acquired by the Tribe. As the Ninth Circuit held in *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959), an allotment is held for the exclusive benefit of the allottee, and "is not part of the reservation, nor is it tribal land." Even if the United States were correct in asserting that modern courts may no longer conclude that allotments are not part of the Reservation, it is undisputable that allotments are held for the exclusive benefit of allottees, and are not tribal land. Because allotments are not tribal land, the United States cannot hold any property rights, including water rights, in such lands for the benefit of the Tribe: it is required by law to "hold the lands thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotments shall have been made." 25 U.S.C. § 348 (2015). Therefore, when the Tribe acquires title to former allotments, any non-consumptive water right would be a new water right with a new priority date.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing State of Idaho's Memorandum in Reply to Responses of United States and Coeur d'Alene Tribe was sent on March 17, 2017, by overnight delivery to the SRBA Court, 253 3rd Avenue North, Twin Falls, Idaho, 83303-2702, and mailed on March 17, 2017, with sufficient first-class postage to the following:

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ADDENDUM

Excerpts from *Idaho II* litigation

United States v. Idaho, 95 F. Supp. 2d 1094 (D. Idaho 1998).[1]

As can be seen from the following excerpts, all findings regarding the Tribe's reliance on fisheries and other water resources related to the 1873 era and prior years; no findings were made addressing reliance on fisheries in the 1891 era.

Page	Excerpt
1099-1100:	"The Coeur d'Alene Indians have occupied the area adjacent to the Lake and the Coeur d'Alene, St. Joe and Spokane Rivers since time immemorial. The Tribe traditionally survived by fishing, hunting and gathering."
1100:	"Historically, the Coeur d'Alene Indians lived in and along the rivers. The Tribe consumed resident trout and whitefish year-round. The resident fishery was a main staple of the Tribe's diet."
1101:	"With the advent of the horse, some tribal members traveled to the Plains during the late fall to participate in an annual buffalo hunt. In this regard, the acquisition of the horse reduced somewhat the Tribe's reliance on fishing and small game hunting. However, the majority of Coeur d'Alenes continued to live along the waterways and engage in a traditional subsistence lifestyle."
1103:	"[I]n 1872 the Tribe continued to rely on the water resource for a significant portion of its needs."
1105:	"[T]he Court concludes that in 1873 the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers."
1106:	"[A]t the time of the 1873 reservation the "Government's Indian agents understood that 'the capture of fish was an essential source of the Indians' food supply.'"

[1] Citations and footnotes are omitted from the excerpted materials.

Likewise, the court's findings regarding the tribe's agricultural efforts all related to the 1873 time frame or earlier; the court made no findings regarding the Tribe's reliance on agriculture in the 1891 era:

1103: "While the second petition makes clear the Tribe's continuous reliance on the Lake and rivers, other sources reporting on the Tribe's economic status during the late 1860's and early 1870's offer conflicting assessments. Several reports emphasize the Tribe's commitment to farming, while other accounts note the Tribe's continued reliance on fishing."

1104: "Having considered all the evidence, the Court finds that at the time of the Executive reservation in 1873 the Tribe continued to be dependent on the Lake and rivers. Reports describing the Tribe's agricultural successes are in conflict with other official assessments, are not necessarily based on personal knowledge, and may be tainted by cultural and personal bias. Depictions of agricultural activity most likely are based on the Tribe's maintenance of garden plots, horses and, in some cases, cattle. Estimates of farmed acreage and agricultural output demonstrate that in the early 1870's the Coeur d'Alenes were not engaged in systematic farming practices."

The district court discussed the negotiation and ratification of the 1887 and 1889 Agreements, but made no findings regarding the primary purposes of the Agreements, as approved in the 1891 Act:

1096: "In 1887, the Tribe and representatives of the United States reached an agreement in which the Tribe ceded

> all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation."

1096-97: "Before it had ratified the 1887 agreement, Congress authorized the Secretary of the Interior 'to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.' The resulting negotiations lead to an agreement in 1889, in which the Tribe ceded the approximate northern third of the 1873 reservation

to the United States. The portion of the reservation subject to the 1889 cession included within its boundaries the approximate northern two-thirds of the Lake. The 1889 agreement provided that it was 'not binding on either party until ratified by Congress.'"

1097: "Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements."

1110: "On March 26, 1887, the Tribe and representatives of the United States reached an agreement in which the Tribe ceded 'all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.' In exchange, the Federal Government promised 'that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes of the Coeur d'Alene Indians.' The 1887 agreement provided that it 'shall not be binding on either party until ratified by Congress.'"

1112-13: "While withholding its approval of the 1887 agreement, Congress took steps 'to acquire ... the northern end of [the 1873] reservation.' On March 2, 1989, Congress passed the annual Indian Appropriations Act, which included a provision that authorized the Secretary of the Interior 'to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.'"

1113: "The minutes of the negotiations reveal that the location of the new boundaries in relation to the Lake and rivers was a matter of concern to both the Tribe and United States. Known for their sagacity, and aware of the Federal Government's tendency to disregard its commitments to the Indian tribes, the Coeur d'Alenes insisted on defining the terms of any new agreement with precision. At one point during the negotiations, General Simpson, the government's chief spokesman, told tribal leader Chief Seltice that 'the Lake belongs to you as well as to the whites-to all, every one who wants to travel on it.' Seltice replied: 'That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.' *Id.* General Simpson then offered the United States' proposal for a diminished reservation and prefaced his description of its boundaries by stating: 'You all know where the St. Joseph River is. We do not want any of that.' The government's proposal called for a new northern boundary that ran east from the Idaho/Washington territorial line to the west shore of the Lake, meandered the lake shore south to a point directly opposite

the mouth of the Coeur d'Alene River, and 'thence due east across said lake.' Thus, the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation and the southern one third of the Lake included within the new reservation boundaries. General Simpson explained to the Tribe that under the government's proposal 'if we buy this land [the northern end of the 1873 reservation] you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.' With some modification, this proposal became the basis of an agreement signed on September 9, 1889. The agreement provided that it was 'not binding on either party until ratified by Congress.'"

1113: "In a 1889/90 Report of the Secretary of the Interior to the House of Representatives, the 1889 agreement is described as an agreement 'whereby the Indians agreed to sell a considerable portion of their reservation (in the northern part), valuable chiefly for minerals and timber, and embracing by far the greater portion of the navigable waters of the reservation.'"

1114: "Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements."

1115 n.24: "The United State contends that despite the explicit language contained in both the 1887 and 1889 agreements, stating that they shall not be 'binding on either party until ratified by Congress,' each agreement became effective on the date signed. The Court need not decide this issue."

1115: "The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is "compelling evidence" that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under the southern third of the Lake."

The district court did make the legal conclusion that Congress ratified the Executive Order's inclusion of submerged lands within the Reservation by recognizing such Reservation before statehood, but never discussed whether Congress ratified the purposes of the Executive Order. Moreover, the district court's legal conclusion regarding ratification

was not adopted by either the Ninth Circuit or the Supreme Court, which both found it unnecessary to reach the issue, as discussed later in this addendum.

1114-15: "Taken together, these events establish that Congress **ratified** the Executive reservation of the submerged lands and demonstrated the clear intent to defeat the future State of Idaho's title to those lands. The evidence shows that prior to Idaho's statehood, Congress was on notice that the Executive Order of 1873 reserved for the benefit of the Tribe the submerged lands within the boundaries of the Coeur d'Alene Reservation. The Senate pointedly asked the Secretary of Interior to confirm whether the Tribe retained control over the 'navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers.' The Commissioner of Indian Affairs, responding in detail, answered in the affirmative. It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers. With this knowledge, Congress **validated** the Executive reservation of the submerged lands by enacting appropriation statutes that authorized government representatives to negotiate with the Coeur d'Alenes for a cession of tribal property. Most important, after the Commissioner of Indian Affairs had in no uncertain terms informed Congress that the Executive reservation included the submerged lands, Congress enacted a provision which authorized the Secretary of the Interior "to acquire ... the northern end of said reservation." By authorizing the Federal Government to negotiate with the Tribe for a release of the submerged lands, Congress acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes. Accordingly, the Court concludes that Congress **recognized** and then **ratified** the Executive reservation of the submerged lands for the benefit of the Tribe."

1115 n.24: "[B]ecause this case is limited to resolving ownership claims of submerged lands that never were ceded, the Court must only decide whether Congress ratified the Executive reservation of those lands prior to Idaho's statehood. As discussed above, the Court concludes that Congress **ratified** the inclusion of the submerged lands before Idaho became a state."

1115: "Congress clearly demonstrated its intent to reserve the submerged lands under federal control by **ratifying** the Executive inclusion of the submerged land within the 1873 reservation."

United States v. Idaho, 210 F.3d 1067 (9th Cir. 2000)

On appeal to the Ninth Circuit, the court declined to determine Congress's purpose in establishing the 1891 Reservation, because it determined such purpose was not relevant to the issue of the Tribe's ownership of submerged lands:

1075-76: "The State's argument that the district court should have determined the **purpose** of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873) lacks support in the case law. **In *Alaska***, where the Supreme Court relied heavily on the **purpose** of the reserves at issue, **the Court did not require either that Congress itself apprehend the purpose or that the purpose be extant at the time of congressional action.** The Court examined the **purpose** of the petroleum reserve, for instance, with regard to the government's goal in 1923, when the Executive reserved the lands, rather than by reference to 35 years later when Congress passed the statehood act referencing its authority over the reserve. What mattered was that Congress recognized that the executive reservation included submerged lands, not that it knew or acknowledged the executive **purpose** in reserving them. Thus, **it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889**. Here there is no dispute that the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873. Indeed, even Congress was specifically on notice of this dependence as a result of the Tribe's second, 1872 petition. What matters, however, is Congress's awareness that the 1873 reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution."

Likewise, the court never concluded that Congress ratified the 1873 Executive Order:

1074-77 "Idaho argues that none of the events leading up to its statehood in 1890 constitute affirmative **ratification** of the executive intent to convey or reserve the submerged lands and thus cannot show congressional intent to defeat state title to these lands.

. . . .

Formal **ratification**, prior to statehood, of the finding of congressional intent to defeat state title. Neither the Supreme Court nor any of our cases require such a showing."

And, the Ninth Circuit emphasized that the district court's findings regarding reliance on fisheries all related to the 1873 time frame:

1072: "The [district] court found that the submerged lands lay within the boundaries of the present-day reservation, that in 1873 the Tribe depended on the Lake and associated rivers for a significant portion of its fishing needs, and that in 1873 the federal government was aware of this dependence."

1075: "As the district court found, and as the State does not challenge, the Tribe was dependent on its fisheries in 1873."

1076: "Here there is no dispute that the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873."

Idaho v. United States, 533 U.S. 262 (2001)

The Supreme Court's few statements regarding the 1891 Act establish that the Reservation ratified by Congress retained a portion of the lakebed, but say nothing contrary to the State's assertion that the primary purpose of the Act was to establish a permanent Reservation suitable for the Tribe's agricultural endeavors. Again, as with the Ninth Circuit the Court never held that Congress "ratified" the 1873 Executive Order; rather, its statements confirm that Congress refrained from ratification of the Reservation until presented with the 1887 and 1889 Agreements, collectively.:

267 "As of 1885, Congress had neither **ratified** the 1873 agreement nor compensated the Tribe."

268 "In January 1888, **not having as yet ratified any agreement with the Tribe**, the Senate expressed uncertainty about the extent of the Tribe's reservation and adopted a resolution directing the Secretary of the Interior to 'inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho,' and specifically, 'whether such area includes any portion, and if so, about how much of the

navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers.' S. Misc. Doc. No. 36, 50th Cong., 1st Sess., 1 (1888)."

269 "[In 1888] Congress **was not prepared to ratify the 1887 agreement**, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself."

270 "[T]he [1889] agreement was not to be binding on either party until both it and the 1887 agreement were **ratified** by Congress."

270 "On June 7, 1890, the Senate passed a bill **ratifying** both the 1887 and 1889 agreements." [Note: the 1890 bill was never passed by the House].

270-71 "On March 3, 1891, Congress 'accepted, **ratified**, and confirmed' both the 1887 and 1889 agreements with the Tribe. The Act also directed the Secretary of the Interior to convey to one Frederick Post a 'portion of [the] reservation,' that the Tribe had purported to sell to Post in 1871."

271 "In 1894, Congress approved yet another agreement with the Tribe, this time for the cession of a lakeside townsite called Harrison, within the boundary of the **ratified reservation**."

277-78 "The facts, including the provisions of Acts of Congress in 1886, 1888, and 1889, thus demonstrate that Congress understood its objective as turning on the Tribe's agreement to the abrogation of any land claim it might have and to any reduction of the 1873 reservation's boundaries. The explicit statutory provisions requiring agreement of the Tribe were unchanged right through to the point of Congress's final 1891 **ratification** of the reservation, in an Act that of course contained no cession by the Tribe of submerged lands within the reservation's outer boundaries."

280. n.8 "The State says that the conveyance to Post included land that was outside the boundary of the 1873 reservation. . . . Suffice it to say that Congress's actions in 1891 were consistent with an understanding that the State did not have title to the riverbeds conveyed to Post, which, along with the later Harrison cession of part of the concededly navigable lake, is consistent with an understanding that no submerged lands within the reservation's stated boundaries had passed to Idaho."

281 "Congress [in 1891] recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands at issue here."

The closest the Supreme Court came to addressing subsistence practices in the 1891 era was the following statement:

275: "The District Court did not merely impute to Congress knowledge of the land survey, but also explained how the submerged lands and related water rights **had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation and granting Idaho statehood**. And the District Court made the following findings about the period preceding negotiations authorized by Congress . . . . "

But, the findings that the Court then quoted for support of the above statement were the following excerpts from the district court opinion:

> "The facts demonstrate that an influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a reservation and to obtain the Tribe's release of its aboriginal lands for settlement. Before it would agree to these conditions, however, the Tribe demanded an enlarged reservation that included the Lake and rivers. Thus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands."

533 U.S. at 275-76 (quoting 95 F. Supp. 2d at 1107). The quoted findings, however, relate to the district court's analysis of whether "a 'public exigency' existed **at the time of the 1873 Reservation**." 95 F. Supp. 2d at 1107 (emphasis added). Thus, the Supreme Court simply erred in citing the material as confirming reliance on submerged lands "throughout the period prior to congressional action confirming the reservation and granting Idaho statehood."